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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 333

UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL-AMERICAN BANK & TRUST CO., AND MERCANTILE NATIONAL BANK AT DALLAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled case on June 16, 1949.

OPINIONS BELOW

The opinion of the district court on the motion for summary judgment (R. 26-36) is reported at 67 F. Supp. 759. Its opinion at the trial on the merits (R. 148-156) is reported at 79 F. Supp. 450. The opinion of the Court of Appeals for the Fifth Circuit on the first appeal is reported at 161 F. 2d 935. Its opinion on the second appeal (R. 182-185) is not as yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1949. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. The basic question presented is whether the United States may recover sums paid on a government check from the presenting bank which guaranteed the genuineness of prior endorsements, where the issuance of the check was procured by fraud and the check was endorsed by the perpetrator of the fraud who was not the payee named on the face of the check and who had no authority to sign the payee's name. This question, in turn, involves the following subsidiary questions:

2. Whether an intent may be ascribed to the United States to have a check payable to the order of the person who submits a fraudulent and forged claim to it, rather than to the order of the person named on the face of the voucher and check who, by law and regulation, alone would be entitled to collect the asserted claim from the United States.

3. Whether the so-called "impostor rule" can apply at all to a check issued by the United States.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra,* pp. 27-28.

STATEMENT

The two actions here involved were filed by the United States, one against the Continental-Amer-

ican Bank & Trust Company on April 24, 1946 (R. 8-10) and the other against the Mercantile National Bank at Dallas on May 16, 1946 (R. 19-21), and sought recovery against respondent banks for breach of their guarantees of the genuineness of prior endorsements on six government checks. The action against Mercantile National Bank at Dallas involved five checks totaling $5,975 (four for $25 each and one for $5,875), all made payable by the United States as drawer-drawee to "Mrs. Beulah Mitchell Gibbs as the unremarried widow of Ben Gibbs, Jr., 1224 Taylor Street, Shreveport, Louisiana" (Exhs. G-2 to G-6). These checks were endorsed by someone other than the named payee and without her authorization (R. 66-67), and were cashed at the Continental-American Bank and Trust Company at Shreveport. That bank forwarded them for collection to the Mercantile National Bank at Dallas, Texas, which bank in turn guaranteed the payee's endorsement and obtained payment from the Government through the Federal Reserve Bank of Dallas (R. 38). The action against Continental-American Bank at Shreveport involved one check for $60 made payable by the United States as drawer-drawee to "Mrs. Beulah Mitchell Gibbs as the unremarried widow of Ben Gibbs, Jr., 911 Milam Street, Shreveport, Louisiana" (Exh. G-1). This check was also endorsed by someone other than the named payee and without her authorization (R. 66-67), and was cashed at the Continental-American Bank which gave the

same guarantee and obtained payment from the Government through the Federal Reserve Bank of Dallas (R. 16).

Both defendant banks moved for summary judgment (R. 10, 22) and argued, on the basis of affidavits, that one Bertha Smith, posing as Beulah Mitchell Gibbs, filed a fraudulent application for certain benefits as the unremarried widow of Ben Gibbs, Jr., who died while in the service in World War I; that the Government intended to approve the application of, and have the checks cashed by, the person with whom it dealt; and that the Shreveport bank in cashing the checks for Bertha Smith carried out the intent of the Government and, accordingly, there were no forgeries (R. 27, 67 F. Supp. at 760). The district court denied defendants' motions for summary judgment with an opinion holding that, under the decisions of this Court in *National Metropolitan Bank* v. *United States,* 323 U. S. 454; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; and *United States* v. *National Exchange Bank of Providence,* 214 U. S. 302, the United States was entitled to recover (R. 26-30, 67 F. Supp. 759). It specifically rejected (R. 27-28) the "impostor" doctrine (as applied to the United States in *United States* v. *National Bank, Albuquerque,* 131 F. 2d 985 (C. A. 10), certiorari denied, 318 U. S. 774) that the United States, as drawer-drawee, cannot hold a presenting bank which had guaranteed prior endorsements on a Government check made payable, as the result of a fraudulent claim, to a named payee and then fraudulently endorsed in the payee's name without

authority. After respondents answered, the United States moved for and was granted summary judgment in each case without further opinion (R. 18, 42), apparently for the reasons set forth in the earlier opinion of the district court. Respondent banks then took the first appeal to the court below, which, after holding that the *Albuquerque Bank* case and not the *Metropolitan* and *Exchange Bank* cases govern in cases where the United States has delivered its commercial paper to a fraudulent claimant, reversed and remanded "for proceedings not inconsistent" herewith. (R. 54, 161 F. 2d 935.)

At the trial before the district court following the remand from the court of appeals, the evidence disclosed the following facts: Ben Gibbs, Jr., died while in the military service on October 27, 1918 (R. 80). He had not at that time applied for insurance (R. 72) but, under the prevailing statute if he left a surviving wife, she would be entitled to automatic insurance benefits for 240 months at $25.00 a month as long as she remained unremarried (R. 81). In 1932, a letter was received by the Veterans Administration from Gibbs' sister indicating, for the first time, that he had been married at the time of his death (R. 72-73). In 1936, following certain letters addressed to the Veterans Administration by a person who stated that she was Gibbs' widow (R. 73), affidavits were received reciting that Ben Gibbs, Jr. had been married on May 21, 1914, to Beulah Mitchell.[1] On

[1] The evidence discloses that Ben Gibbs, Jr., had actually been married to Beulah Mitchell but that Beulah Mitchell had remarried shortly thereafter. In 1936, the actual Beulah

April 7, 1938, the Veterans Administration received by mail an affidavit purportedly signed by Mrs. Beulah Mitchell Gibbs swearing that she was the unremarried widow of Ben Gibbs, Jr. On April 22, 1938, a verified claim for insurance on Form 514 (entitled Affidavit in Support of Insurance Claim) was received, purportedly signed by Mrs. Beulah Mitchell Gibbs by a mark duly witnessed. It stated that the claimant was Mrs. Beulah Mitchell Gibbs, that Ben Gibbs, Jr., her husband, died in the service on or about November 22, 1918, that she had been married once only. It bore an attestation that claimant was known to be the widow of Ben Gibbs, Jr., the affiants being Henry Mitton and Carrie Robertson. (R. 77-78.)

The claim was examined in the Claims Division of the Veterans Administration, and a decision of law and facts signed by T. L. Bentz, a duly authorized official, was entered on May 3, 1938, holding that Ben Gibbs, Jr. had died in circumstances entitling his widow to automatic insurance, that Mrs. Beulah Mitchell Gibbs was his unremarried widow, and as such entitled to such insurance (Exhibit G-12). After the claim was approved, it was sent to the Finance Service of the Veterans Ad-

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Mitchell Gibbs, whose name at that time was Beulah Douse, was approached by a Shreveport man who told her he could get her insurance if she would swear that she had not remarried and would move to Shreveport until the necessary papers could be put through. This she refused to do, as she had already been advised by the local Red Cross that she was not eligible for automatic insurance because she had remarried. The same man approached her on a couple of subsequent occasions, seeking to persuade her to participate in the fraud but she declined so to do. Exhibits D-22, D-23.

ministration where it was placed on a voucher embracing several other claims. The voucher, in turn, was signed by an authorized approving officer who certified "I certify that this voucher is correct, and the payees are entitled to the amounts set opposite their respective names; that the amounts stated are actually due as shown by the facts of record; that all the relative data are stated and that this voucher has been examined and found true and just and is approved in the amounts chargeable to the above appropriation(s) and/or fund(s) * * *" (Exhibit G-8). The voucher was thereupon transmitted to the Treasury Department and, in due course, a check was drawn by an authorized disbursing officer of that Department, payable to the order of Beulah Mitchell Gibbs, as unremarried widow of Ben Gibbs, Jr. (Exhibit G-2). Four other government checks, duly vouchered in this form by an approving officer of the Veterans Administration for the payment of $25.00 insurance claims, were issued in the same manner (Exhibits G-3, G-4, G-5 and G-6).

On September 2, 1938, an unsigned typewritten letter was received by the Veterans Administration applying for death compensation benefits in the name of Beulah Mitchell Gibbs (R. 79). Under the date of September 27, 1938, a verified application for dependency benefits on Veterans Administration's Form 534 was executed by a person who signed as Beulah Mitchell Gibbs, reciting substantially the same facts as were set forth in Form 514,

with the added information that there were no children, that claimant's annual income from washing and ironing was $6.00 a month, that claimant had received automatic insurance benefits, that claimant had never remarried since the death of the veteran and had never separated from the veteran except while he was in the military service, and had never married but once (R. 80). On November 21, 1938, there was an administrative determination that the cause of death, bronchial pneumonia, was service-connected for the purposes of compensation or pension benefits (R. 81). A decision of questions of fact and law signed by W. S. Welsh, an authorized official of the Veterans Administration, was then duly made, holding that Beulah Mitchell Gibbs was entitled to the dependency allowance of $30.00 per month (Exhibit G-9). This decision of law and facts was transmitted to the Finance Office where a voucher was prepared, certified by an authorized approving officer, and transmitted to the Treasury Department. A check for $60.00, representing two months' dependency benefits, payable to the order of Beulah Mitchell Gibbs as the unremarried widow of Ben Gibbs, Jr., was duly issued by an authorized disbursing officer of the Treasury and forwarded to Beulah Mitchell Gibbs at the address given in the claim (Exhibit G-1).

A woman by the name of Bertha Smith, who had fraudulently made these claims (R. 158-159), intercepted the first check when mailed to Beulah

Mitchell Gibbs at the address given in the Affidavit of Claim. In company with a notary public by the name of W. B. Williams who had notarized her various affidavits of claim, she proceeded to the bank of respondent Continental-American Bank and Trust Company, where she was identified by Williams to the assistant cashier as the Gibbs woman, the payee of the check (R. 114). The assistant cashier relied exclusively on the identification of the woman as Beulah Mitchell Gibbs by W. B. Williams (R. 117, 118, 120). He made no other investigation concerning the identification of the woman as the payee (R. 118). Bertha Smith was thereupon taken by the assistant cashier to the teller's window where the assistant cashier identified her (R. 123). The teller cashed the check exclusively upon the assistant cashier's identification (R. 132). The check for $5,875 was thereupon cashed in part, and part deposited to the credit of Beulah Mitchell Gibbs. The other checks (G-1, G-3, G-4, G-5, G-6) were subsequently cashed by the teller upon the identification thus established by the assistant cashier of respondent Continental-American Bank and Trust Company (R. 133-134).

The district court found that the defendant banks had satisfactorily proved that the application was made by Bertha Smith, that the checks had been delivered to her, and that she cashed them (R. 158-160). The district court also specifically found that the officials and employees of the Veterans Administration intended that payment be made to

Beulah Mitchell Gibbs and no one else (R. 158), and that the disbursing officials of the Treasury Department in issuing the checks likewise had that sole intent (R. 158). But it concluded, in the light of the opinion by the Court of Appeals on the first appeal, that the checks were cashed by the same party with whom the United States had dealt and that therefore the "impostor rule" applied and the defendant banks were not liable to the United States on their guarantee of prior endorsements (R. 159-161). Judgments were entered for defendants (R. 169-170) and the United States in its turn appealed.

On the second appeal, the majority of the court adopted its opinion on the first appeal as the law of the case and expanded the views previously expressed,[2] Chief Judge Hutcheson dissenting (R. 182-186). Judge Hutcheson held that there was nothing in the record to show that the United States intended the checks to be cashed by Bertha Smith or endorsed by anyone other than the named payee, Beulah Mitchell Gibbs; that a bank cannot voluntarily assume the burden of identifying a payee by guaranteeing the genuineness of the endorsement and then escape the consequences of the guarantee because the Government was deceived; and that the impostor rule, even if otherwise valid,

[2] The court below apparently entertained no doubt as to its power to disregard the law of the case, had it believed that its prior decision was incorrect. Cf. *Kelly-Springfield Tire Co.* v. *United States*, 110 F. 2d 823, 827 (C. A. 3). In any event, the law of the case established by the court below is not controlling here. *Messenger* v. *Anderson*, 225 U. S. 436, 444.

cannot be applied to Government checks of this type.

REASONS FOR GRANTING THE WRIT

The only method of obtaining payment of government checks—other than by presentation to the Treasurer of the United States—is through a Federal Reserve Bank, or branch, when the checks have been "properly endorsed by responsible incorporated banks and trust companies who guarantee all prior endorsements thereon."[3] Respondents voluntarily availed themselves of this method of collection and specifically guaranteed the genuineness of prior endorsements made by one whom respondent Continental-American Bank & Trust Co., had identified and accepted as its depositor. After it had been discovered that the endorsement of the checks in question in the name of Beulah Mitchell Gibbs had been by Bertha Smith, the United States brought suit against the respondents to recover for this breach of their voluntary guaranty of the genuineness of Beulah Mitchell Gibbs' endorsement. The court below denied recovery. It held that although the endorsement whose genuineness the respondent banks voluntarily guaranteed was not that of the named payee, the United States was nevertheless precluded from enforcing the guarantee because each check must be deemed to

[3] 31 C.F.R. 202.32. Federal Reserve Banks and branches were not expected to cash Government checks and warrants presented directly by the general public. *Ibid.* Substantially identical provisions were restated in Department Circular 176 of December 21, 1945, 11 F.R. 102, 31 C.F.R. (1945 Supp.) 202.25.

have been intended to be payable to Bertha Smith, the impostor who perpetrated the fraud, and not to Beulah Mitchell Gibbs, the payee in whose name the endorsement was made. Respondents were accordingly exonerated from all liability notwithstanding the terms of their written agreement, without which the United States would not have paid the checks. That holding is in plain conflict with the decisions of this Court in *National Metropolitan Bank* v. *United States*, 323 U. S. 454, and *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, in which it was held that a cashing bank, which was under no obligation to accept the payee's endorsement, was absolutely liable upon its guarantee of the genuineness of the payee's signature when that signature was forged. These same cases, relied upon by the district court in granting summary judgment for the Government (67 F. Supp. 759, 760),[4] were twice urged upon the court below, and twice rejected. We submit that the refusal of the court below to follow the controlling decisions of this Court in an important and recurring matter relating to the conduct of the fiscal affairs of the Government, and the wholly untenable ground upon which it relied to free the respondent banks from liability, call for review by this Court.

1. *The court below refused to follow the controlling decisions of this Court.* The *National Metropolitan Bank* and the *Exchange Bank of*

[4] See *supra*, pp. 4-5.

Providence cases, *supra*, stand unqualifiedly for the proposition that, where (a) false and fraudulent claims are made in the names of innocent persons who have no knowledge whatsoever of the transactions, (b) accounting or disbursing officers of the Government are deceived, (c) vouchers are prepared on the basis of the false claims, (d) checks payable to the innocent persons are issued on the basis of the vouchers, and either are delivered or mailed to the persons who prepared or submitted the false claims, (e) who thereafter endorse the name of the payee:—that endorsement is a forgery and the United States may recover from an endorsing bank which has guaranteed the genuineness of the payee's signature. The instant case falls squarely within those holdings, as a comparison of the three cases unquestionably demonstrates.[5]

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[5] The facts in the *Metropolitan Bank* case were stated by the Court of Appeals for the District of Columbia as follows (142 F. 2d 474-475):

"James H. Foley was a civilian clerk in the Headquarters office of the Paymaster of the United States Marine Corps in Washington City. He was assigned to prepare officers' pay and mileage vouchers, to prepare checks in payment thereof, to present the checks for signature by the Paymaster or other disbursing officers duly authorized to draw checks on the Treasury, and to deliver the signed checks to the named payees. From time to time during a period of twenty-eight months, beginning shortly before July 13, 1936, and ending November 14, 1938, Foley forged pay and travel mileage vouchers, together with the necessary supporting travel orders, and prepared one hundred and forty-four Treasury checks for payment of the amounts of the forged vouchers and orders. In the ordinary course he presented the checks to the Paymaster, who signed them. All were payable to one or another of sixteen actually existing Marine officers stationed in Washington. None of the payees was entitled to the proceeds of the checks or had any knowledge of the fraud. The signed checks were returned to Foley for distribution to the several officers, but

Here, Bertha Smith, an illiterate woman, entered upon a scheme, with others, to defraud the United States. Claims were filed by her in the name of Beulah Mitchell Gibbs setting forth facts which, if true, established that Beulah Mitchell Gibbs was the unremarried widow of Ben Gibbs, Jr., a deceased veteran of World War I and thus entitled to automatic insurance and dependency benefits. The real Beulah Mitchell Gibbs, who had remarried, was not a party to the fraud nor was she entitled to the benefits for which claim was made. (See fn. 1, *supra,* pp. 5-6.) The claims were forwarded by mail to the Veterans Administration, where, after passing through several channels, it was determined that Ben Gibbs had died in circumstances entitling

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Foley, instead of delivering the checks, forged the signatures of the payees, added his own name as second endorser, and cashed or deposited them with the Anacostia Bank of Anacostia, District of Columbia. That bank made no investigation of the genuineness of the payees' signatures, but took the checks in reliance on Foley, stamped them with the endorsement—'Pay to the order of any Bank, Banker or Trust Company. Prior endorsements guaranteed,' and transmitted them to the National Metropolitan Bank (appellant) for collection. The latter bank likewise so endorsed the checks, presented them to the Treasury and received payment. It credited the collections to the Anacostia Bank in the regular course of business and paid over the proceeds prior to the discovery of the forgeries in November, 1938, and the Government's demand on appellant of repayment in December, 1938."

The facts in the *Providence Bank* case were stated by this Court as follows (214 U. S. at 303-304):

"Upon receipt of pension vouchers, regular in form and purporting to be executed by the pensioners named therein—but which in fact were forgeries—the United States pension agent at Boston drew the checks in question upon the subtreasury at Boston, aggregating $6,362.07, in favor of the pensioners named in the vouchers, and transmitted such checks by mail directly to the address of each pensioner as given in the

his unremarried widow to automatic insurance benefits and, if dependent, to death compensation benefits. On the basis of documentary evidence submitted in support of the claim, findings of fact were made that Beulah Mitchell Gibbs was his unremarried widow and that she was a dependent. Vouchers were then prepared calling for the payment of the amount which would be due to Beulah Mitchell Gibbs under the appropriate statutes and regulations, had the facts set forth in the claims been true. The vouchers were transmitted to the Treasury Department. On the basis of the vouchers, the disbursing officers of the Treasury Department drew the checks in question and returned them to the Veterans Administration which placed them in the mail addressed to Beulah Mitchell Gibbs at the address given in the claims. They were either delivered to or intercepted by Bertha Smith, who forged the signature of Beulah Mitchell Gibbs to the checks as she had to the claims, and the

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vouchers, in accordance with the provision of § 4765, Rev. Stat. Of the persons named in the checks fifteen had died, and the others were the widows of soldiers who had remarried, and whose right to a pension had ceased, all the names, however, as we have said, having been forged. With but two exceptions the checks were either for $24 or $36.

"The checks with the forged endorsements thereon of the payees were cashed by the Exchange Bank, and immediately endorsed to a national bank in Boston for collection. The checks were presented by the collecting bank at the sub-treasury of the United States in Boston. The collecting bank received payment of the same and accounted for such payment to the Exchange Bank.

"* * * in December, 1898, Munson, who was undergoing imprisonment upon a sentence imposed June 22, 1898, for forging a pension check, with which presumably this case is not concerned, admitted that he had forged the signatures of the payees on the checks in suit."

checks were presented to respondent, the Continental Bank and Trust Company, which received the same, placed its endorsement on the back thereof, guaranteed the genuineness of prior endorsements, forwarded the same for payment, and, in accordance with applicable regulations, received payment therefor through the Federal Reserve Bank.

We can find no distinction of any substance between the instant case and the *Metropolitan* and *Providence Bank* cases (fn. 5, *supra,* pp. 13-15.) All involved a scheme to defraud the United States; all involved the filing of false claims in the names of persons who, had the facts set forth in the claims been correct, would be entitled to certain payments; in no case was the named payee entitled to the amount claimed; in all cases the claims were forwarded to the appropriate federal authorities who issued checks in reliance upon the truth of the facts set forth therein; and in all cases the checks were either delivered to or intercepted by the person perpetrating the fraud, who forged the names of the payees and either cashed or deposited the checks at a bank which guaranteed the genuineness of the endorsement; and in all cases the endorsing banks breached their guaranty of the genuineness of prior endorsements. The checks were all forwarded through channels to the Treasurer of the United States, who paid them solely in reliance upon the guaranty of the presenting banks.[6]

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[6] That the court below incorrectly summarized the facts in the *Exchange Bank* and *Metropolitan* cases (R. 183-4) is made clear by the statements of facts of those cases quoted in fn. 5, *supra,* pp. 13-15.

In the *Metropolitan Bank* case, as well as here, payment was sought and obtained through Federal Reserve Banks in accordance with the applicable regulation (31 C.F.R. 202.32 fn. 3, *supra,* p. 11), which provided that checks would be paid only when the checks contained a guaranty by a responsible presenting bank of the genuineness of prior endorsements. That was the obligation which respondents breached, and on which they should have been held liable under this Court's rulings.

It is implicit in the opinions below that the court believed the loss should fall upon the United States because its officials were negligent (R. 184). But even assuming that Government officials carelessly permitted themselves to be deceived, an assumption that the record and the trial court's findings do not warrant (R. 158-160), the irrelevance of that fact has already been settled by this Court. As the Court remarked, in the *Metropolitan Bank* case (323 U. S. at 458):

> This guaranty was a protection which the government sought not only as to checks which were issued in due course having valuable consideration, but as to checks which might have been illegally issued. That the administrative officers failed fully to perform their duty is no reason why the government should be deprived of the advantage of a guarantee independently made by one who was not under compulsion of any kind to make it. No equitable principles require that one who, for his own reasons, guarantees a payee's

signature after issuance of a check, shall be relieved of his voluntarily assumed obligation because others who owed the government obligations had previously defaulted in their obligations.[7]

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[7] The Court of Appeals' approach was also condemned in the *Exchange Bank of Providence* case where this Court stated (214 U. S. at 318-319):

> By §§ 4764 and 4765, Rev. Stat., it is required, before a pension check shall be issued, that vouchers shall be supplied, and the duty is cast upon the Secretary of the Interior of making rules and regulations to establish the identity of the pensioner. As shown by the record, the regulations thus promulgated require vouchers to be signed in duplicate before an officer authorized to administer an oath * * *. The pensioner is required * * * to sign and make oath to a statement as to his identity, his existing right to the pension and his post office address. The officer is required to certify * * * that the pensioner was fully identified; * * * and the address of the pensioner is to be stated in the certificate. These requirements are incompatible with the assumption that the Government was chargeable with knowledge of the identity, continued existence, and right to pensions, or with the signatures of those entitled to receive pension moneys. *The requirement by the Government of proof, for its own protection, affords no ground for the contention that as to any action taken as the result of the furnishing of such proof the Government is estopped as to third parties from showing that the proofs furnished were false and fraudulent and that the Government had been deceived thereby.* To so hold would be to say that from the act of exerting a precaution against fraud there arose a presumption by which the fraud could be successfully accomplished. *This would be the case if it were now held that because by forged vouchers the Government was deceived into acting third parties had a right to rely upon the integrity of the proof and to estop the Government as though representations as to the verity of such proof had been made by it to such third parties.* The rights, therefore, of the bank as the apparent acquirer of the pension checks are to be governed by the nature and character of the instruments and cannot be enlarged so as to relieve the bank from the obligation of warranty implied in the presentation of the checks and the collecting of the amount. The subject is aptly illustrated in the opinion

Thus, contrary to the holding below, the decisions of this Court make it clear that the bank, which voluntarily accepts the endorsement, owes a duty to the United States to make certain that the endorsement is that of the named payee and that a failure to perform that duty makes the bank liable to the United States under its guarantee of the genuineness of prior endorsements.[8]

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by Coxe, Judge, in *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259, affirmed by the Circuit Court of Appeals for the Second Circuit in 64 Fed. Rep. 703. [Emphasis supplied.]

[8] The decision below is also in conflict with that of the Court of Appeals for the Second Circuit in *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (mentioned approvingly in the *Exchange Bank opinion*, 214 U. S. at 319, fn. 7, *supra*, pp. 18-19). The court there stated (pp. 704-705):

> The plaintiff in error contends, however, that under the facts proved in this case it should not be required to respond. It is argued that the loss was the natural and proximate result of negligence in issuing the drafts. It appears, however, that they were issued only upon the receipt of vouchers regular in form, apparently subscribed by Alma Wood and by two witnesses, with a certificate by a notary public that all three of them had, on August 2, 1882, appeared personally before him, and made oath to the truth of their respective statements, and that he believed them to be credible persons. With such vouchers before him, it was certainly not negligence on the part of the pension agent to send checks for the amount receipted for to the person inscribed on his roll as a pensioner, at her post-office address. The government had a right to rely upon the fact that the assistant treasurer would pay out no money on the draft except to Alma Wood personally, upon proof of her identity, or to some responsible person presenting her endorsement and guarantying its genuineness; *and it is no defense to a claim that an endorsee who has, by a forged endorsement, received from the drawee money to which he is not entitled, shall refund the same, to show that the same person who deceived him into paying money on the forged endorsement of the draft also induced the government to issue the draft on a forged signature to the voucher.* [Emphasis supplied.]

2. *The so-called "impostor rule" has no application to Government checks.* The court below undertook to relieve respondent banks from their plain liability for breach of their guarantee of prior endorsements, as established by this Court in the *Metropolitan* and *Exchange Bank* cases, by choosing instead to accept the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *National Bank, Albuquergue,* 131 F. 2d 985, certiorari denied, 318 U. S. 774, which applied the so-called "impostor rule" to a similar suit by the United States. That rule, unrecognized by the Negotiable Instruments Law, and with neither antiquity [9] nor unanimity [10] to recommend it, has been adopted by a number of courts who, borrowing from a principle of the law of sales (5 Williston, *Contracts* (Rev. Ed. 1937) sec. 1517), have announced the proposition that where a person fraudulently assumes the identity of a third person, deceives the drawer of the check into believing that he is that third person, and the drawer of the check delivers a check made payable to the order of the third party to the impostor, the drawer's dominant intent is that the check be paid to the order of the

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[9] The impostor rule has no counterpart in the English decisions. The first true impostor case relying on a supposed intent which we have been able to find is *Emporia National Bank* v. *Shotwell,* 35 Kans. 360 (1886).

[10] *District National Bank* v. *Washington Loan & Trust Co.,* 65 F. 2d 831 (C.A. D.C.); *Keel* v. *Wynne,* 210 N.C. 426; *Citizens' State Bank of McLean* v. *Fuller* (Tex. App.), 274 S.W. 208; *Simpson* v. *Railroad Co.,* 43 Utah 105; *Tolman* v. *American National Bank,* 22 R.I. 462; *Commonwealth* v. *Globe Indemnity Co.,* 323 Pa. 261; cf. *Cohen* v. *Lincoln Savings Bank,* 275 N.Y. 399, reject the impostor rule.

deceiving impostor rather than the third person to whose order he has made the check payable. We think it clear that this dubious rule has not been, and should not be, applied to Government checks.

a. In circumstances precisely comparable to those presented here, as we have pointed out (*supra*, pp. 13-17), this Court has twice—as late as 1945—imposed liability upon the guaranteeing bank in "impostor" situations, without any suggestion that the normal rule of liability should not govern.

b. Moreover, application of this so-called rule to Government checks is logically untenable and without support in the law merchant—whatever its doubtful merits in private transactions.[11] The rule rests upon an assumed intention to make payment to the impostor, rather than to the named payee, and, accordingly, the Court of Appeals was compelled to hold that it was the intention of the "Veterans Administration"[12] to deliver the checks to

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[11] See Abel, *The Impostor Payee*, 1940 Wisc. L. Rev. 161, 217-233, 362; 7 Brooklyn L. Rev. 220; 18 Cal. L. Rev. 693; 34 Harv. L. Rev. 76; 37 *id.* 149; 22 Mich. L. Rev. 61.

"In the last analysis it must be admitted that the drawer did not intend to pay money to a confidence man or other fraudulent person, and that he did intend the bank to pay over his money to the *bona fide* business man or donee whom he named as payee." 8 N. Car. L. Rev. 77.

"If it is not the intent of all persons who draw checks to give it [them] for a supposedly valid consideration, then business men must be more foolish than anyone ever suspected." 18 B. U. L. Rev. 148, 153.

[12] The Veterans Administration is of course the United States. Cf. *National Home* v. *Wood*, 299 U.S. 211, 213.

the very person who practiced the fraud upon it and to have the checks paid to the order of that defrauder.[13] But the district court had specifically found upon uncontradicted evidence that the Government employees and officials who drew the checks and prepared the vouchers "intended that payment be made to Beulah Mitchell Gibbs, the unremarried widow of Ben Gibbs, Jr., the deceased veteran, and no one else" (R. 158). And it necessarily follows from the very nature of the Government's fiscal operations that an assumed intention to make payment to the impostor can have no place. For the statutes of Congress and the regulations of the pertinent agency, which provide the only manner in which the intention of the *United States* can be expressed and the only source from which it can be ascertained, specifically limit the payment of claims to a definite category of people and provide for safeguards in order to make certain that the

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[13] As a corollary, the court stated that there was no forgery involved in the signing of Mrs. Gibbs' name to the checks (R. 183). But it seems clear that Bertha Smith's signing of Beulah Mitchell Gibbs' name to the checks was just as much forgery as her signing of the same name to the claims. Section 23 of the Negotiable Instruments Law (*infra*, p. 28) provides that "When a signature is * * * made without the authority of the person whose signature it purports to be, it is wholly inoperative." Moreover, in just such cases as this, the fraudulent claimant, who endorsed, can be and has been convicted of forgery. Cf. *United States* v. *First National Bank & Trust Co.*, 17 F. Supp. 611, 612 (W.D. Okla.); *Central National Bank* v. *National Metropolitan Bank*, 31 App. D.C. 391, 394. Finally, if carried to its logical result the decision below would require the absurd holding that if Mrs. Beulah Mitchell Gibbs had gotten hold of the checks and endorsed them, her signature of her own name would be a forgery because she was not the intended payee.

United States is not defrauded by persons making false claims.[14] The Government officers who process and pay these claims are persons with limited powers whose authority is restricted to that expressly granted to them by statute or regulation. *The Floyd Acceptances,* 7 Wall. 666, 677; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Wilber National Bank* v. *United States,* 294 U. S. 120. To ascribe to them an intent, which rather obviously they do not, and could not, have, is to evade this rule of strict agency by indirection. The impostor rule, aside from its basic illogic, cannot be applied to government checks without doing violence to these long accepted principles.

A second ground for rejecting the "impostor rule" in Government check cases is that it presupposes a physical meeting between the drawer and the defrauder. Under the law of sales, from which the rule is borrowed, title to goods does not pass when they are delivered to an impostor who has practiced his deception by mail. *Cundy* v. *Lindsay,* 3 A. C. 459 (1878). Passage of title can occur only when there is a physical confrontation between the impostor and the vendor. *Ibid.* A majority of the courts which have adopted the impostor rule therefore apply it only where there is

[14] In rejecting an impostor argument in respect of a check issued by the State of Pennsylvania, the Supreme Court of that state (which otherwise accepts the "impostor rule") said in *Commonwealth* v. *Globe Indemnity Co.,* 323 Pa. 261: the intent of the Commonwealth was that recited in the check. See also the observations of this Court in the *Providence Bank* case, fn. 7, *supra,* pp. 18-19.

face to face confrontation between the impostor and the drawer. See 22 Mich. L. Rev. 61; 15 N. Car. L. Rev. 186; 11 Univ. of Cincinnati L. Rev. 89; 24 Va. L. Rev. 192. These courts rely upon the proposition that, where there has been an actual meeting, a drawer may have been mistaken as to the sort of man he dealt with but not as to the man himself. "The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name." *Robertson* v. *Coleman,* 141 Mass. 231, 232. Cf. *Cohen* v. *Lincoln Savings Bank,* 275 N. Y. 399; *Montgomery Garage Co.* v. *Manufacturers Co.,* 94 N. J. L. 152. Here, as is the case with most Government claims, there was no physical meeting between the impostor and any government agent (R. 158). As Judge Hutcheson aptly remarked in his dissent below, distinguishing such instances of personal dealing from Government transactions (R. 185):

> It is a far cry, though, from this situation to the one we have here. Here the government, dealing through agents and by mail over great distances and issuing countless checks to named, but not otherwise identified, payees, *in no way undertakes to identify the payee to the bank, in no way misleads the bank into paying it,* and guaranteeing endorsement of the payee.

c. Even the case of *United States* v. *First National Bank, Albuquerque,* 131 F. 2d 985, certiorari

denied, 318 U. S. 774, relied on by the court below, lends the decision below only indifferent support. In that case, the Court of Appeals for the Tenth Circuit specifically held that it was the intention of the government official who drew the check to have it payable to the order of the impostor and assumed that there had been a face to face confrontation between the impostor and the disbursing officer. (131 F. 2d at 989).[15] Here, the intention of the Treasury officer drawing the check was that it should be paid to the real widow (Beulah Mitchell Gibbs) and no one else; here also there was no face to face confrontation between the impostor and any officer of the United States, much less the drawer of the check.

3. *The question is important.* The United States, which issues tens of thousands of checks each year, is the greatest payer of claims and the largest drawer of checks in the country. As the recent appellate decisions we have cited indicate, cases frequently arise, not unnaturally, in which an im-

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[15] For the reasons set forth in our petition in No. 695, October Term, 1942, we think that decision was incorrect. Furthermore, that decision, while recognizing that its opinion was contrary to the *Exchange Bank of Providence* case, *supra*, and *Onondaga Savings Bank* v. *United States*, 64 Fed. 703, *supra*, fn. 8, p. 19, believed that the effect of those cases had been dissipated by the decisions of this Court in *United States* v. *Chase National Bank*, 252 U. S. 485, and *United States* v. *Exchange Bank of Baltimore*, 270 U. S. 527. The later decision of this Court in the *Metropolitan Bank* case clearly distinguished the *Chase Bank* case as merely involving a variation of the doctrine of *Price* v. *Neal*, 3 Burr. 1354 (as also did the *Exchange Bank of Baltimore* case), and reasserted the continued vitality of the *Providence Bank* case. 323 U. S .at 457-8.

postor succeeds in defrauding the Government and having a check issued to him in another's name as payee. A further authoritative ruling by this Court on the scope of the presenting bank's guarantee of prior endorsements in this situation is necessary and desirable, and all the more so because the decision below, which fails to follow this Court's controlling rulings, has no basis in principle or the law merchant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition herein for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1949.

APPENDIX

1. The Act of September 2, 1914, 38 Stat. 711, established a Bureau of War Risk Insurance in the Treasury Department. Section 401 was added by the Act of October 6, 1917, 40 Stat. 398, 409, as an amendment to Section 2. The pertinent parts of Section 401 as amended by the Act of December 24, 1919, 41 Stat. 371, 374, are:

> * * * Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of one hundred and twenty days after October 15, 1917, or one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each; and any person inducted into the service by a local draft board after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before being accepted and enrolled for active military or naval service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or

before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his widow from the time of his death and during her widowhood; * * * *Provided, however,* That no more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability shall be so paid. * * *

2. Veterans' Regulation 1(a), promulgated by Executive Order Number 6156, June 6, 1933, and appearing after 38 U. S. C. 739, states in Part 1, Paragraph IV:

> The surviving widow, child or children, and/or dependent mother or father of any deceased person who died as a result of injury or disease incurred in or aggravated by active military or naval service as provided for in part 1, paragraph 1 hereof, shall be entitled to receive pension at the monthly rates specified next below:
>
> Widow under 50 years of age.....$30
> * * *

3. Section 23 of the Uniform Negotiable Instruments Law:

> FORGED SIGNATURE.
>
> When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired

through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

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No. 333

In the Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA

Petitioner

versus

CONTINENTAL-AMERICAN BANK & TRUST COMPANY and MERCANTILE NATIONAL BANK AT DALLAS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, pursuant to Rule 38, Paragraph 3, file this brief in opposition to the petition for certiorari herein.

OPINIONS BELOW

The opinion of the District Court on the motion for summary judgment (R. 26-36) is reported at *67 F. Supp. 759*, its opinion at the trial on the merits (R. 148-162) at

79 F. Supp. 450. The opinion of the Court of Appeals for the Fifth Circuit on the first appeal is reported at *161 Fed. (2d) 935*, its opinion on the second appeal (R. 182-185) at *175 Fed. (2d) 271.*

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the provisions of *28 U. S. C., 1254(1)*, assigning the following reasons for granting the writ:

"1. The Court below refused to follow the controlling decisions of this Court.

"2. The so-called 'impostor rule' has no application to Government checks.

"3. The question is important."

STATEMENT

Respondents accept petitioner's statement of facts for the purpose of this brief, but respectfully reserve the right to question its accuracy upon plenary argument if such becomes necessary.

SUMMARY OF ARGUMENT

In *United States vs. First National Bank, Albuquerque, 131 Fed. (2d) 985 (C. C. A. 10)*, the "impostor rule" was invoked to defeat the claims of the United States in a suit presenting the identical legal problem posed by the petition in the instant case.

The "impostor rule" applied in the *Albuquerque* case, held by the Court below to correctly state the federal law on the first appeal, *161 Fed. (2d) 935*, and applied to the facts of this case on the second appeal, *175 Fed. (2d) 271*, is stated in the following language:

> "With few exceptions, it is held that the drawer of a check, bill of exchange, or other negotiable instrument, cannot recover from an intermediary bank on its endorsement, or from the payee bank upon its payment, where the check, bill or other instrument is drawn and delivered to an imposter under the mistaken belief on the part of the drawer that he is the person whose name he has assumed and to whose order the check, bill, or other instrument is made payable, and the intermediary bank acquires it from the imposter upon his endorsement thereon of the name of the payee, or the payee bank pays it upon such endorsement, as the case may be. Although not in full accord in respect of the reasons for their conclusion, most courts hold that while the drawer acts in the mistaken belief that the person with whom he deals either in person or *by correspondence* is the person whose name he has assumed and pretends to be, still it is the intent of the drawer to make the check, bill, or other instrument payable to the identical person with whom he deals and therefore to be paid on his endorsement; and that accordingly payment to him or his endorsee merely effectuates the intent of the drawer."/1

On March 15, 1943, this Court denied certiorari in

1/ **United States vs. First National Bank, Albuquerque, 131 Fed. (2d) 985,** emphasis supplied.

the *Albuquerque* Case/[2] and the limited purpose of this brief is to point out that the instant petition adds no valid argument to those rejected in the Albuquerque application.

ARGUMENT

The Instant Case Cannot Be Distinguished From the Albuquerque Case.

Petitioner's attempt to distinguish this case from the *Albuquerque* Case on the ground that the latter involved a physical meeting between the imposter and the disbursing officer/[3] is contradicted by its statement to the effect that the two cases are similar/[4] and by Footnote Three of its petition for certiorari in the *Albuquerque* Case reading:

> "Notwithstanding the assumption of the court below, there is nothing in the record to show that the imposter Ott applied in person to the Veterans Facility at Albuquerque, New Mexico, for the application or loan or, if he did, what dealings he had in respect of the loan with any employee or agent of the United States. In any event it is clear that the check was not delivered to him personally. It was addressed by mail to the veteran named in the certificate at a hotel address which had been given by the imposter. (R. 19). We do not regard these points as at all controlling."/[5]

2/ **318 U. S. 774.**
3/ Petitioner's brief pages 23 to 25.
4/ Petitioner's brief page 20.
5/ See page 7 of petition for certiorari in **United States vs. First National Bank, Albuquerque,** No. 695, October Term, 1942.

The Petition Herein Adds Nothing to the Arguments Which This Court Rejected in the Albuquerque Application.

It is contended that the decision below is in conflict with two decisions of this Court, *United States vs. National Exchange Bank of Providence, 214 U. S. 302*, and *National Metropolitan Bank vs. United States, 323 U. S. 454*. The asserted conflict with the *Exchange Bank of Providence Case* was unsuccessfully urged in the *Albuquerque* application. The statement of the facts of the *Metropolitan Bank Case* appearing in the footnote on Page 13 of the petition shows that the case involved nothing more than a plain forgery and is therefore irrevelant to a consideration of the question presented by the instant petition. The checks were never delivered to the persons for whom they were intended. They obviously were not intended for the clerk who forged the signatures. He did not impersonate the payees. The intent was that they should be delivered to the military personnel named therein but they were intercepted by the clerk when they arrived at the Paymaster's office. The intention of the drawer was never carried out as in the case of an impostor. In any event the "impostor rule" was neither urged nor discussed.

The contention that the "impostor rule" has no application to Government checks is a mere reiteration and amplification of the arguments in support of the same contention which this Court rejected in the *Albuquerque*

application. It ignores the fact that the rule is supported by the weight of authority/6, as well as the numerous decisions of this Court to the effect that the United States as a party to commercial paper is bound by the same principles that govern private persons in their relation to such paper./7

The asserted importance of the question is even less apparent now than six years ago when this Court, in the face of the same contention, denied certiorari in the *Albuquerque* Case. In that application petitioner argued that the question was important "in the light of the fact that owing to the constantly increasing number of checks which the Government issues, an increasing number of these cases involving the imposter question may be expected."/8 The check involved in the *Albuquerque* Case was cashed on April 7, 1931. We knew of no case, and the Solicitor General has cited none, other than the present controversy over $6,035, involving the application of the "impostor rule" to Government checks which has reached an Appellate Court since the *Albuquerque* decision. Under the circumstances the decision of the Court below cannot reasonably be regarded as a threat to the public fisc.

6/ 7 Am. Juris. 435. 9 C. J. S. 742.

7/ United States vs. Priscilla Barker, 12 Wheaton 559; United States vs. The Bank of Metropolis, 15 Peters 377; Pierce s. United States, 7 Wallace 666; Cooke vs. United States, 91 U. S. 389; United States vs. National Exchange Bank of Baltimore, 270 U. S. 527; United States vs. Guaranty Trust Company, 293 U. S. 340; Clearfield Trust Company vs. United States, 318 U. S. 363.

8/ See page 14 of petition for certiorari in United States vs. First National Bank, Albuquerque, No. 695, October Term, 1942.

CONCLUSION

For the reasons stated Respondents respectfully submit that the decision of the Court below is correct, the question presented is of no public importance and the petition for certiorari should be denied.

Respectfully Submitted,

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October, 1949